TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 276.

THE UNITED STATES, APPELLANT,

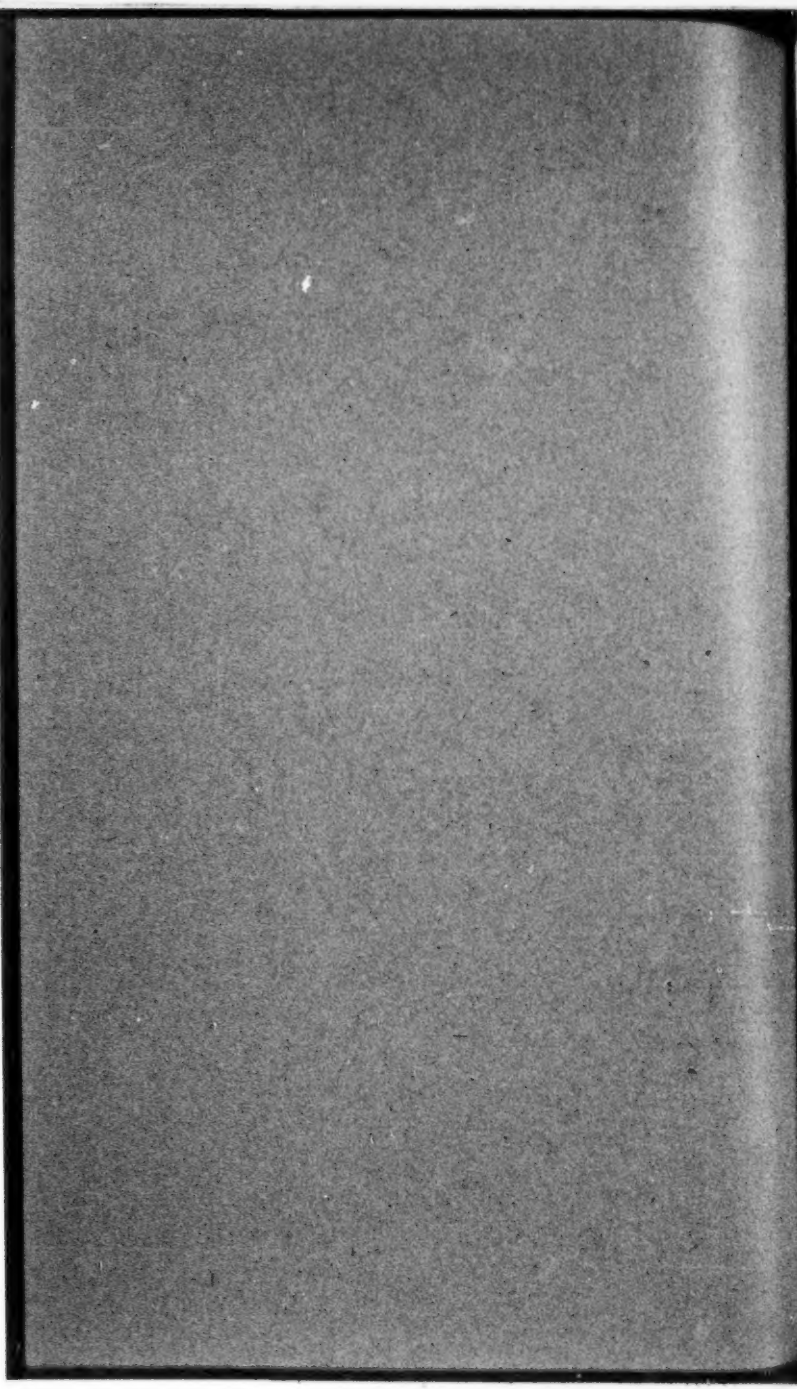
vs.

JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 28, 1906.

(20231.)



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INDEX.

	Original.	Print.
tion	1	1
verse	4	2
nment and submission	5	2
dings of fact	6	2
clusion of law	6	3
nion	6	3
enting opinion of Atkinson, J	8	5
gment	12	8
dication for appeal	13	8
wance of appeal	13	8
k's certificate	14	9

In the Court of Claims.

JOHN M. HITE
vs.
UNITED STATES. } No. 22517.

I. *Petition—Filed March 23, 1901.*

e petition of John M. Hite respectfully represents:

That he is a citizen of the United States and a resident of the city ltimore, State of Maryland; that he has at all times borne true ance to the Government of the United States, and that he has never y way voluntarily aided, abetted, or given encouragement to rebel- gainst said Government.

That by act approved March 3, 1899 (30 Stat. L., 1228), Congress ded, among other things, that—

he officers and enlisted men comprising the temporary force of the during the war with Spain who served creditably beyond the limits e United States, and who have been or may hereafter be discharged, be paid two months' extra pay; and all such officers and enlisted of the Navy who have so served within the limits of the United s, and who have been or may hereafter be discharged, shall be paid nonth's extra pay."

That on the 14th day of May, 1898, he was appointed and com- oned an assistant engineer in the temporary force of the Navy of Inited States for the war with Spain, under the provisions of an act of ress approved May 4, 1898, and served creditably as such officer on the United States battleship "Massachusetts," beyond the limits of the United States, to wit, in Cuban waters, from the 1st day of June until the 17th day of December, 1898, on which latter date s detached from said ship and ordered home, and on the 22d day ecember, 1898, he was honorably discharged from the naval service.

That on the 18th day of April, 1899, he received from the Govern- the sum of $166.66 as two months' extra pay under said provision arch 3, 1899, which allowance was based on the leave pay of an ant engineer, the accounting officers of the Treasury having con- l said provisions of said act of March 3 as authorizing only extra s of the grade occupied by the beneficiary at the time of his dis- e; and that he has never received any further amount on said nt.

That the sea-service pay of an assistant engineer in the Navy was, s, $1,700 per annum, and petitioner is advised and believes that said nting officers construed said provision of said act of March 3 erro- ly, and should have construed it as authorizing and directing the ent to him of two months' extra-service pay as of the kind of e performed by him during the war with Spain, to wit, sea-service nd that he should have been paid the sum of $283.32 instead of 66, and that the Government is still indebted to him on this account ifference between said sums, or $116.66.

That he is the sole owner of said claim and no assignment or trans- as been made thereof, or of any part thereof, or any interest therein; he is justly entitled to the amount of $116.66 from the defendant

after allowing all just credits and set-offs; and he demands judgment against the defendant for said sum.

JOHN M. HITE.

EDWARD S. MCCALMONT,
Attorney for Claimant.

I, John M. Hite, do solemnly swear that I have read the fore-
3 going petition by me subscribed and know the contents thereof, and that the facts stated therein on my own knowledge are true and those stated on information and belief I believe to be true.

JOHN M. HITE.

Subscribed and sworn to before me this 22d day of March, 1901.

HARRY S. WELCH,
Notary Public, D. C.

4 II. *Traverse—Filed as of Dec. 6, 1905.*

In the Court of Claims of the United States, December term, A. D. 1905–6.

JOHN M. HITE
vs.
THE UNITED STATES. } No. 22517.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

5 III. *Argument and submission.*

This cause was argued by Mr. E. S. McCalmont for the claimant, and Mr. John Q. Thompson for the defendants, on the 6th day December, 1905, and submitted.

6 IV. *Findings of fact and conclusion of law—Also the opinion of the court and dissenting opinion—Filed March 12, 1906.*

JOHN M. HITE
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, John M. Hite, was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary

service during the late war with Spain, on May 14, 1898; he reported for duty on board the U. S. S. "Massachusetts," in obedience to orders of the Navy Department, on June 1, 1898, and served creditably as such officer on said ship until December 17, 1898, at which date he was detached and ordered to his home, and on December 22, 1898, was honorably discharged from the naval service.

The order referred to is in the words following:

"NAVY DEPARTMENT,
"*Washington, D. C., Dec. 12, 1898.*

"SIR: You are hereby detached from duty on board the U. S. S. "Massachusetts," and will proceed to your home.

"Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Regulations, 1896.

"Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

"Respectfully,

"JNO. D. LONG, *Secretary.*

"Assistant Engineer JOHN M. HITE, U. S. N.,
"*U. S. S. Massachusetts.*"

II.

The U. S. S. "Massachusetts" was in commission and cruised beyond the limits of the United States (in Cuban waters) during the time of the claimant's service on board.

III.

In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the Treasury Department two months' pay at the rate of pay of an assistant engineer in the Navy on waiting orders only, to wit, $166.66.

If entitled to two months' pay upon the basis of sea service the difference is $116.66.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment in the sum of one hundred and sixteen dollars and sixty-six cents ($116.66).

PEELLE, Ch. J., delivered the opinion of the court.

On May 14, 1898, the claimant herein was appointed and commissioned an assistant engineer in the temporary force of the Navy, under the provisions of the act of May 4, 1898 (30 Stats. L., 369), in substance authorizing the President in case of exigency to appoint from civil life such officers to serve "only during the continuance of the
7 exigency under which their services are required in the existing war." The claimant was assigned to duty on the U. S. S. "Massachusetts," a vessel in commission, on which vessel he served creditably in

Cuban waters until December 17, 1898, when he was detached therefrom and ordered to his home. Five days thereafter, December 22, he was discharged, his services being no longer required.

The war with Spain, which began April 21, 1898, terminated in fact at the time of, if not before, the signing of the treaty of Paris of December 10, 1898. Thomas case (39 C. Cls. R., 1–5).

The claimant has been paid $166.66, being two months' pay based on leave or waiting orders pay of an officer of his grade. He claims the difference between that sum and $283.32, the latter being two months' pay based on sea service, hence this action.

The act of March 3, 1899 (30 Stats. L., 1228), provides:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

The defendants' contention is that this case is ruled by the case of United States v. North (112 U. S. R., 510) and the case of Emory v. United States (19 C. Cls. R., 254), in the first of which cases the court, in respect of the pay the claimant was entitled to receive under the act, said:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers, his pay must be in accordance with that rank."

It will also be noticed in that case that the court said "their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority." And further, "That as North was serving at sea when he was ordered away, he was entitled to three months' sea pay." In the present case the claimant was ordered away from the service when he was detached from his vessel, as he was appointed to serve "only during the continuance of the exigency under which their services are required in the existing war," and the war was over.

In the Emory case it was held that the act of February 19, 1879 (20 Stat. L., 316), extended the provisions of the act of July 19, 1848 (9 Stat. L., 248), to the officers, soldiers, and seamen of the Army and Navy who served in the war with Mexico, and that three months' extra pay provided for by those acts was pay proper and not pay and allowances. It was further held in that case that the kind of pay an officer was receiving when his service ended furnished the standard by which the extra pay was given.

8 In the Terrell case (40 C. Cls. R., 78) the question was whether the claimant could recover the extra pay of the rank which he held at the time of muster out, and the ruling was that the acts

of January 12, 1899, and May 26, 1900, extended only to the pay which an officer or soldier would have received if his regiment had not been furloughed.

In response to the defendants' contention and to the authorities they cite, the claimant contends that inasmuch as he was commissioned in the temporary force of the Navy his engagement ended when he was detached from his vessel and ordered home. He was detached from his vessel seven days after the signing of the treaty of Paris. His engagement having ended and he having been discharged, the two months' extra pay should have been given him upon the basis of the pay he was receiving when detached.

The claimant was in the temporary service of the Navy pursuant to a statute for that purpose. The facts in this case are exceptional, and upon those facts the case must rest. To hold, because the claimant was ordered to his home where he was discharged five days later instead of being discharged on the day he was detached, that therefore he is entitled only to the lesser pay would be a construction too narrow to harmonize with the purpose of Congress as disclosed by the act.

The act clearly gives to officers "comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged," two months' extra pay. The two months' extra pay is given because of creditable service beyond the limits of the United States during the war with Spain, and therefore upon discharge such officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States, and this is in effect the ruling in the Terrell case (supra).

In other words, the basis of the two months' extra pay is for service at sea beyond the limits of the United States during the war with Spain, and to hold that when such service has been rendered the extra pay shall be upon a different basis would defeat the purpose of the statute, and thus believing, we must hold that the claimant is entitled to recover the difference between what he was paid and the sea pay of his grade, amounting to one hundred and sixteen dollars and sixty-six cents ($116.66), for which judgment is ordered to be entered.

ATKINSON, J., dissenting.

I regret that I can not concur in the opinion of the court in this case, for the reason that it appears inequitable not to do so; but it seems to me that it so clearly comes within the decisions of this court and the Supreme Court of the United States, in cases where the same principle is involved, that I feel it to be my duty to dissent.

The act of March 3, 1899 (30 Stat. L., 1228), under which this suit is instituted, reads as follows:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

9 This suit, therefore, was brought by reason of the rejection of the claimant's claim for two months' sea-service pay by the accounting officers of the Treasury, and allowing him only waiting-orders pay. The rejection was based upon a ruling of the Auditor of the Navy Department made March 8, 1899, construing said act as modified by a decision of the Assistant Comptroller of the Treasury made March 11, 1899 (5 Comp. Dec., 559).

The Assistant Comptroller held that the rate of pay contemplated by the Congress was according to the kind of service the officer or enlisted man was engaged in performing at the time of his discharge. His conclusion was based upon the decision of the Supreme Court of the United States in the cases of the United States v. North and Emory (112 U. S. R., 510).

No question is raised before us as to the right or duty of the Government to pay claimant the two months' extra pay provided for by the statute above quoted; but the question referred to the court, and upon which a decision is asked, is whether claimant should be paid "sea-service" pay, which is at the rate of $1,700 per annum, or "shore" or "waiting-orders" pay, which is only at the rate of $1,000 per annum allowed to officers of the rank of the claimant in this case, while he is not engaged "at sea" or in "sea service."

Claimant's counsel contends that the decision of the Supreme Court in the North and Emory cases, supra, is that the court did not have before it any question as to the rate of pay intended by the acts giving extra pay to those officers who had served in the Mexican war in the military and naval service of the United States, and that therefore there is a material difference between that case and the case at bar. I have carefully examined the facts in that case, because it seemed to me harsh and apparently unjust to the claimant in the case before us that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service. Five days thereafter he was honorably discharged, and after his discharge he was paid at the rate of $1,000 per year, which was the pay allowed under the statute while he was "waiting orders." Equity seems to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty;" but the statute before us, which is somewhat ambiguous, does not define in plain terms whether an officer discharged under such circumstances shall be paid on the basis of "sea pay," "shore pay," or "waiting-orders pay;" yet the decision in the North and Emory cases, supra, is in no respect ambiguous, as I read it, and it is therefore our duty to be guided by it.

In the cases of Emory and North v. The United States (19 C. Cls. R., 270) the court said:

* * * * * * *

"The court has no power to legislate as to what grade of pay naval officers shall now receive. It can not decree that an officer waiting orders shall recover sea-service pay or that an officer on sea service shall recover waiting-orders pay. But inasmuch as Congress went to the act of 1848 when enacting that naval officers shall receive three months' extra pay, the court may go there for a like purpose and carry

out the analogy which the act of 1879 instituted. We therefore hold that the pay which a naval officer was receiving when his service in the war with Mexico ended furnishes the standard by which his three months' extra pay must be computed. If he was then on sea service, it will be sea-service pay; if he was on other duty, it will be other-duty pay; if he was on waiting orders, it will be waiting-orders pay; if he was a lieutenant commanding, it will be a lieutenant's pay when commanding; if he was a lieutenant on other duty, it will be simply a lieutenant's pay. As to the point of time in the period of an army or navy officer's service which shall be taken as equivalent to the muster out of the volunteers—the time at which his rank must be ascertained and extra pay must be computed—we are of the opinion that it should be the time when his 'actual service during the war' ceased. In the case of volunteer officers that time was definitely by the event of their muster out. They served in the war with Mexico not till the signing of the treaty, not till the exchange of ratifications, not till the passage of the act giving them three months' extra pay, but until they had 'served out the term of their engagements,' as evidenced by their muster out."

These cases were appealed to the Supreme Court of the United States, and the decision of this court was affirmed as stated above. The Supreme Court not only had before it in review the various acts of Congress bearing upon the point in issue, but it also had before it the opinion of the Court of Claims as well, which is exhaustive and convincing, and which explicitly holds, in language which can not be mistaken or misconstrued, that the time from which the extra pay must be reckoned is not from the date of the signing of the treaty of peace, but it must be when the soldier's actual service ceased, which time is definitely fixed by the date that he was mustered out of the Army or the Navy.

It is plainly evident to my mind that Chief Justice Waite, in passing upon these same cases on appeal, sustained the views expressed by the Court of Claims, when the language following was used by him:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers his pay must be in accordance with that rank."

What are we to infer was the intent of the Supreme Court in the language above quoted when read in connection with the decision of the Court of Claims, which it was then reviewing? Did it intend to hold that the officer's pay was to be computed from the time of the signing of the treaty of peace? It does not say so. But it does say that it was "at the end of their engagement," which in the case of both Emory and North was at the time "when they were honorably discharged."

The claimant in the case at bar, however, is not in every respect on all fours with the cases of Emory and North. The claimant Hite in the case before us was not detached from his ship until after the treaty of

peace was signed with Spain, and five days subsequent to the receipt of such order he was honorably discharged from the service of the United States Navy. It is clearly evident that the court meant to
11 convey the idea, the same as it was expressed by the Court of Claims, that the engagement of the officers could not be completed until they were regularly mustered out of the service.

If this were a matter of first impression, the exceptional circumstances which the court thinks should bring this case within the spirit of the statute might prevail. But neither this court nor the Supreme Court has construed the statute to mean anything more than its language implies.

The Supreme Court in the Emory and North cases, supra, in construing the act of 1848, held that the rate of pay an officer should receive must be the pay pertaining to the character of duty he was performing at the time of his discharge. Applying this construction to the act of March 3, 1899, which is in fact a practical reproduction of the act of 1848, we should hold in the case at bar, although, in a sense, it bears the mark of harshness, that the petition of the claimant should be dismissed.

I am authorized to state that Howry, J., concurs in this dissent.

12 V. *Judgment of the court.*

JOHN M. HITE
v.
THE UNITED STATES. } No. 22517.

At a Court of Claims held in the city of Washington on the 12th day of March, 1906, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, John M. Hite, do have and recover of and from the United States the sum of one hundred and sixty-six dollars and sixty-six cents ($166.66).

BY THE COURT.

13 VI. *Application for, and allowance of, appeal.*

JOHN M. HITE
vs.
THE UNITED STATES. } 22517.

From the judgment rendered in the above-entitled cause on the 12th day of March, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 17th day of April, 1906, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed April 17, 1906.

Ordered: That the application for appeal in the above-entitled cause be allowed as prayed for.

BY THE COURT.

April 17, 1906.

14 Court of Claims.

JOHN M. HITE
v.
THE UNITED STATES. } No. 22517.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court and of the dissenting opinion; of the judgment of the court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 27 day of April, 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

15 (Indorsement on cover:) File No. 20231, Court of Claims. Term No. 276. The United States, appellant, vs. John M. Hite. Filed April 28th, 1906. File No. 20231.

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